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In the High Court of Judicature at Madras

Dated: 09-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.84 OF 1997

1.Jayaraman
2.Muthu
3.Periammal
4.Sundari
5.Minor Parimala
represented by
mother and guardian Periammal ..Appellants

v

1. Perumayammal
2. Pachamuthu ..Respondents

This Second appeal was filed under Section 100 CPC against the judgment and decree dated 9.8.1995 made in A.S.No.294 of 1994 on the file of the Principal District Judge, Salem, confirming the Judgment and decree dated 21.10.1994 made in O.S.No.47 of 1989 on the file of the District Munsif's Court, Attur.

For Appellants : Mr.T.Murugamanickam

For Respondents R.1 and R.2 : Mr.D.Balaji

JUDGMENT

The defendants in O.S.No.47 of 1989 on the file of District Munsif's Court, Attur, who have lost their defence before the trial court and in the first appeal too are before this Court in the second appeal.

2. The suit was filed by the plaintiffs in O.S.No.47 of 1989 on the file of District Munsif's Court, Attur, for an order of permanent injunction against the defendants, restraining them from taking water from the common well in Survey No.208/6 to Survey Numbers 208/3 and 208/9 apart from their lands in Survey Numbers 208/4 and 208/7.

3.The short facts of the plaintiffs' case in the plaint runs as follows:

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The plaint schedule property belonged to the first plaintiff Krishnan who died pending suit. The predecessors-in-title of the first plaintiff viz., Mukkan had purchased the plaint schedule property from the brother and father of the first defendant on 10.8.1951. On the same day, an agreement of sale and a deed of re-sale were also came into existence between the parties. The deed of re-sale was cancelled by the predecessors-in-title of the plaintiff Mukkan and others as per relinquishment deed dated11.7.1985. The first plaintiff was in possession and enjoyment of the suit property from 6.9.1965 onwards. The second plaintiff is the only son of the first plaintiff. He is assisting the first plaintiff in the administration of the suit properties. The suit property was originally an inam land. After inam abolition, the land was converted into riotwari and in lieu to that resurvey number was assigned and extent was fixed under UDR scheme. The fourth defendant is the wife of the first defendant. The second defendant, third defendant, fifth defendant and sixth defendant are the children of the first defendant. The plaintiffs are having their ancestral lands around the suit land. There was no cordial relationship between the plaintiffs and the defendants for the past seven years. Both the plaintiffs and the defendants are enjoying in common the motor pumpset installed in Survey Number 208/6 measuring 0.05.0 hectares. The water from the common well can be used for the purpose of irrigation of the lands bearing survey numbers 208/4,5,7 and 8 alone. The defendants have purchased survey numbers 208/3, and 208/9 without irrigation facility(without common well). Both of them are punja lands. The lands belonging to the plaintiffs are situated in close promixity to the common well. The common well yields soft water. When the defendants approached to take water from the common well to irrigate their nearby lands in Survey numbers 208/3 and 208/9 the same was rejected by the plaintiffs. The defendants are now making arrangements to amalgamate the lands in survey numbers 208/3 and 208/9 to form a single paddy field. But they cannot take water from the common well in Survey numbers 208/3 to the newly formed paddy field. Since the plaintiffs have objected to the defendants for taking water from the common well to their paddy fields, the defendants have developed a grudge against the plaintiffs, thereafter they began to reduce the width of the cart track leading to the plaintiffs' well. To show the lie of the properties, the plaintiffs have produced a rough sketch along with the plaint. The plaintiffs had issued a notice on20.9.1988 for which the defendants have sent a reply notice on 29.9.1988 . In the reply notice, the first defendant has admitted that he is not entitled to take water to the lands he had purchased subsequently. But he has denied that his old survey number, land was inducted with the new survey number land. The defendants have further denied the right of the plaintiffs over the common cart track and also in the motor pumpset. The matter was referred to the panchayatars who have directed the parties to approach the Court.

4. The second defendant has adopted the written statement filed by the first defendant which reads as follows:

The plaintiff is not the absolute owner of the suit property. It is

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not correct to say that the first plaintiff purchased the suit property from the parents and elder brother of first defendant. She purchased some items of the suit property with wrong description from her elder brother Mookka Konar. It turn the said Mookkakonar purchased the same from the parents and elder brother of the first defendant. The alleged deed of reconveyance is no way concerned with the present suit. It is false to say that the plaintiff is in possession of the suit property from 1951. She is the owner of the property as alleged in S.Nos.208/5, measuring 0.07.0 hectres and in 208/8 measuring 0.19.0 hectres and half share in the S.No.208/6 where the well is situated. It is true that there is a well in S.No.208/6. She is entitled to half share in the eastern side of the common well with a picota. It remains as a heap of levelled sand just 30 feet below the ground level and not dug by the plaintiff. The other equal half in the well is being enjoyed by this defendant. He has dug the well by spending huge amount to a depth of 40 to 45 feet from the heap of sand. The total depth of the well portion of this defendant will be 75 feet from the ground. This defendant has obtained an electric service connection No.400 in his name for his exclusive enjoyment and is paying tax and installed electric motor pumpset. There is no common cart-track in the western side running from North to South at a breath of 7 ½ feet in S.No.208/4. The defendant would further submit that both the plaintiff and the defendant can reach their respective property from the main road directly. So, the plaintiff need not requrie any cart-track or pathway across the land of the defendant as alleged since there is direct access from the Rasipuram Main road. The plaintiff has filed this vexatious suit only with a view to harass the defendant due to their improvements. This defendant submit that he can enjoy the water from his portion of the well as he likes and the plaintiff cannot question the same. It is false to say that the defendant denied permission to the plaintiff to take water from the common well. The plaintiff cannot take water from the common well since her portion remains only as a heap of sand. The plaintiff is not doing nanja crop but only punja crop. There are only vadhanarayanan tree in the property of the plaintiff. The alleged denial has been introduced with a view to prejudice this Court. The reply notice sent by the defendant states that the defendant is not taking water at that time due to the deposit of water in his portion. But the plaintiff wrongly construed the reply and claims an unlawful right. The defendant can take water to his lands depending upon the necessity. The alleged panchayat and their advice to the plaintiff are all false. There is no merit and bonafie in the suit. The suit as framed is not maintainable and liable to be dismissed. The alleged cause of action are all false. This defendant never obliterated the cart-track and this Plaitniff has got no right at all to question the enjoyment of the defendant's properties. Correct court fee has not been paid. Hence the suit is liable to be dismissed.

5.The second defendant has filed an additional written statement as follows:

The averment that the plaintiff is entitled to common half share in the land and well situated in survey No.208/6 is false. The plaintiff is

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entitled only to the eastern half of the land and the well situatd in S.No.208/6 belongs to this defendant absolutely. The defendants are enjoying the western half of the well and the lands in S.No.208/6 as their own, openly, peacefully, continuously and adverse to the interest of the plaintiffs and their predecessor Mooka Konar right from the year 1951. The plaintiffs have no semblance of right over the western half of the lands and the well situated in the S.No.208/6. Neither the plaintiff nor their predecessor in title ever used the western half of the well. The service connection No.408 which stands in the name of the 1st defendant and the motor pump sets that are installed in the western portion of the well belongs to the defendant absolutely. The plaintiff's claim over the same is unsustainable. The plaintiffs have no right of way over any portion of the lands belonging to the defendants. The sale deed dated 6.9.1965 in favour of the 1st plaintiff is a self serving document and will not bind the defendants nor their properties. The plaintiffs are not entitled to the relief of Mandatory injunction in respect of path way as they have no right of way over the lands of the defendants. Hence the suit is liable to be dismissed.

6.On the above pleadings, the learned trial judge has framed four issues and seven additional issues on various dates. On the side of the plaintiff P.Ws.1 to 3 were examined and Ex.A.1 to Ex.A.17 were marked. On the side of the defendants D.W.1 & 2 were examined and Ex.B.1 to B.44 were marked. A commissioner was appointed, who has filed Ex.C.1-report and Ex.C.2 & 3 -plans. On the basis of the available evidence both oral and documentary and also after perusing the commissioner's report and plans the trial Court has granted an order of injunction to the effect that defendants cannot take the water from the common well situated in S.No.208/6 to defendant's S.No.208/4 and 208/7 and not to S.No.208/3 or 208/9. It has been further directed by the trial Court that the defendants have to set right the cart-track marked as "A, E" out of their own funds within three months from the date of the decree thereby granted an order of mandatory injunction against the defendants.

7. Aggrieved by the findings of the learned trial Judge, the defendants preferred an appeal in A.S.No.294/94 before the Principal District Judge, Salem, who had confirmed the decree and judgment of the trial Court. As against the findings of the learned Principal District Judge, Salem, in A.S.No.294/94, the present second appeal has been preferred by the defendants.

8.The substantial questions of law involved in this appeal are as follows:-

i) Whether a conveyance made by a party who has no right, title or interest in a third party's property can be valid in law and bind the third party's interest?

ii) Whether the suit can be decreed when the 1st plaintiff who has allegedly obtained certain rights

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under Ex A1 has not examined herself as a witness to prove what has been pleaded in the plaint?

Iii) Whether the suit can be decreed in favour of the second plaintiff, who has no right in the suit property?

9. The plaintiff claims right in respect of the plaint schedule property under sale deed 6.9.1965, which marked as Ex.A.1 before the trail Court. Ex.A.1 is in favour of the first plaintiff-Perumayammal. Ex.Ex.A.1 who had purchased 66 cents out of 3 acres 72 cents in S.No.363. It is seen from the evidence of P.W.1 that after the purchase of the suit property under Ex.A.1, the propety has been resurveyed and under UDR scheme patta No.319 was assigned to the suit property purchased by the first plaintiff. Ex.A.6 is the patta issued in favour of the first plaintiff of the resurvey No.208/5 and 208/8. According to the plaintiff a common well is situated in resurvey No.208/6 even Ex.A.1-sale deed. There is a recital to the effect that one half right in the common well was also been sold to the first plaintiff under Ex.a.1. A Commissioner was appointed in this case and he has filed Ex.C.2-plan wherein he hs shown the common well and the existing pathway leading to the common well situated in S.No.208/6 by red doted line. The defendants in their written statement have also admitted in para 2 at page 2 that "The first plaintiff is entitled to half share in the eastern side of the common well with a picota." The dispute centre around between the plaintiff and the defendants in respect of taking water from the common well situated in S.No.208/6 by the defendants to the land in S.No.208/3 and 208/9 situated on the Eest-North of the land belonging to the plaintiff (S.No.208/5 and 208/8 and West of the defendants' land in S.No.208/4 in 208/7.

10. The learned counsel for the appellants relied on 99 L.W. 5 (SC) (Ayyaswami Gounder and others Vs. Munnuswamy Gounder and others) and contended that right of co-ownership cannot be restricted to that of the user of the land by a co-owner so as to prejudicially affect or put the other co-owner to a detriment. The leaned counsel would argue that it is not desirable to allow the party to create hurdles in the irrigation of the other parties plot through common channel from their exclusive well. The facts of the said case are as follows:-

> "The plaintiff, who are the appellants before the Supreme Court in the said appeal, filed the suit for declaration of their right to take water from their exclusive well marked W.1 in the suit plan attached with the plaint and situate in a plot of land exclusively belonging to them, through a portion of a channel to their plots at survey Nos.95 and 96 lying to the north of the common well, W2 in the joint land of the parties and for a consequential relief of permanent injunction restraining the defendants-respondents from interfering with the enjoyment of the plaintiffs' right to take water from W1 through the aforesaid channel. The High Court had allowed the Second Appeal differring from the lower court, and it dismissed the

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suit holding that the plaintiffs did not acquire any right either by grant or by prescription by way of easement and it however, found that the plaintiffs by taking water from their exclusive well through the common channel would be throwing additional burden on the common channel and common land which was not and could not have been intended by the parties at the time of the partition when they kept their well and the lands situated around it and the common channel for the common enjoyment of the parties.

Even though the plaintiffs in that suit based their claim under Section 8 of the Indian Easements Act, they mainly based their claim as right of co-ownership.

The parties are descendants from a common ancestor and they owned joint properties. A partition took place between the parties in or about 1927 whereunder survey Nos.95 and 96 fell to the share of the plaintiffs and 15 cents of lands in plot No.96/5 in which the common well W.2 is situate and the channel running from that common well were, however, kept joint for the common enjoyment of the parties. Water from well W.2 situate in plot No.96/5 was not sufficient enough to irrigate the lands of both the parties got by them in the said partition. The plaintiffs, therefore were irrigating their lands from the well in survey No.103/2 purchased by the father of the plaintiffs in 1928 in the name of plaintiffs' mother under Ex.A.1 and they were irrigating their land obtained in partition through the common channel from their own well in survey No.103/2 by connecting the common channel in the common land in survey No.96/5 by means of a small channel to take water to their lands in survey Nos.96/3, 96/1, 95 and 92. The defendants objected to the use of the common land in survey No.96/5 and the common channel running in survey No.96/5 for taking water from their exclusive well in survey No.103/2. Hence, the suit.

The defendants admitted, as in the case on hand, their right to enjoy the common well by both parties.

The trial Court found that the plaintiff being co-owners of the common property were entitled to use the property in the way most advantageous to them and the defendants having not pleaded or proved any damage or loss to the common property cannot obstruct the plaintiffs from taking water to their lands from their exclusive well through the common channel.

The trail Court held that the plaintiffs being co-owners can use the common land to form a channel.

On appeal the first appellate Court concurred with all the findings of the trial Court. But, first appellate Court thought it fit to modify the decree of the trial Court by fixing terms for the plaintiffs' use of the channel. With that modification, the first appellate Court confirmed the decree and judgment of the trial Court.

In the second appeal, the learned single judge did not

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agree with the decision of another single Judge in AIR 1973 Mad 42 (Subbia Goundan Vs. Ramaswamy Goundan), instead of referring the matter to a larger bench took a different view. Hence, the appeal before Honourable Apex Court, wherein the Honourable Apex Court has held that:

> If the parties had entered into a contract then they would be governed by the terms of the contract but on the case on hand there was no such stipulation about the manner or mode of enjoyment of the common well and the common channel. There is yet another reason why we would be reluctant to encourage the defendants to stop the plaintiffs from irrigating their fields from their own exclusive well through the common channel. In these days of scarcity when every effort is being made at all levels to increase the agricultural production to feed the country's teeming millions it would not be desirable to allow the defendants to create any hurdle in the irrigation of the plaintiffs' plots through the common channel from their exclusive well. Thus, neither the law nor expediency warrants a conclusion as desired by the defendants. The apex Court after setting aside the judgment of the High Court restored the judgment of the first appellate court.
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> In the above said dictum the defendants relied on the decision in (1970)1 MLJ 376 (Sivarama Pillai Vs. Marichami Pillai) wherein it has been held as follows:
>
> "In the nature of things, a well cannot be divided by metes and bounds and persons who own joint rights in a well (to the right of the water in the well) can enjoy that right either jointly or separately only by resort to a workable arrangement safeguarding and securing the right to irrigate the lands allotted to the respective branches. It is implicit in such arrangements that the common source of irrigation, the well, is kept in common for the only purpose of irrigating the lands whch are allotted to the respective branches and to serve that purpose only, leaving out of account the other incidental purposes like bathing, washing clothes, taking water for cattle etc. The scheme of the arrangement cannot admit of any notion of the parties being entitled to the particular quantity of water (so many gallons) treating that alone as a distinct item of property divorced from the lands. The well is set apart as common property for the most beneficial and profitable enjoyment of the land and it does not matter what label the parties give to their rights in the well, whether it is a right to a particular share in the well or whether a right to take water by turns. But what is crucial is that in the case of lands, valuable right is the source of irrigation."

11. The other dictum relied on by the learned counsel for the

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appellants is 2001(1) LW 706 (S.A.No.1357 of 1999) Mookammal and another V. Chitraputra Karayalar and another) & (S.A.No.1358/1999) (Mookammal and another Vs. 1.The Divisional Electrical Engineer, Tamilnadu Electricity Board (TNEB) (Operation and Maintenane) Sankarankoil and 4 others). On behalf of the appellant in the above said case, it was contended that the right to draw water cannot be dissociatd with the adjacent lands and such alienation of the suit well in part, along with the right to draw water in invalid. Negativing the said contention the learned Judge of this Court has held as follows:

> "Section 6 of the Transfer of Property Act provides that property of any kind may be transferred except as otherwise provided by the Act or by any other law for the time being in force. 1/3rd right in the well and the concomitant right to draw 1/3rd water is a transferrable right and it cannot be held that it is a non-transferrable right. Section 8 of the Transfer of Property Act provides that a transfer of proeprty pases forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof or such part of fraction as is being transferred. Therefore, it is clear that by Ex.B.2 the contesting defendants have acquired 1/3rd share in the suit well, which includes specifically the right to draw 1/3rd water for themselves for being taken away to irrigate some other land and there is no restriction for water being taken to irrigate some other lands. Such a right has been conferred as seen from Ex.B.2 including the right to draw and take water to irrigate the lands unconnected with well through vari, channel as the case may be. The right to draw 1/3rd water has also been conveyed or assigned or transferred in favur of the contesting defendants and it is futile on the part of the plaintiffs to contend that such a right cannot be conveyed at all. . . . . .
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>
> The learned counsel for the appellant relied upon a Division Bench Judgment of this Court in AIR 1929 Madras 25 (Venkatarama Sastri & another Vs. Venkatanarasayya and others), wherein the Court held that ownership of water is not independent of ownership of land and one co-owner using water for other land which results in damage to the other sharers, they can sue for damages as well as for injunction to restrain unauthorised use. If a co-owner makes an unauthorised use of property the other co-owner may sue for injunction. The Division Bench further held that immemorial usage must be implied on the agreement that the water of the tank was to be used for the connected wet ayacut only and not for other land. However, this is not the case here. Hence, the Division Bench Judgment relied upon by the counsel for the appellant has no bearing at all."

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12. When coming to the facts of the case on hand, it is admitted by both parties that a common well is situated in S.No.208/6. Under such circumstances, it is open to the plaintiff as well as the defendants to enjoy the well in S.No.208/6 in common. The plaintiff cannot restrict the defendants as the water cannot be taken to the defendants' land situated on the East of the plaintiff's land in S.No.208/9 and west of the defendants land in S.No.208/3. But unfortunately neither the trial Court nor the first appellate Court have given an workable arrangements for both the parties to use the common well situated in S.No.208/6. With regard to the mandatory injunction regarding the common pathway leading to the common well in S.No.208/6 as shown in Ex.C.2-plan in red dotted line along the western corner of S.No.208/4 on the basis of the Commissioner's report Ex.C.1, the trial Court has held that the said pathway leading to the common well in S.No.208/4 has been meddled with by the defendants and hence, the defendants have been directed to set right the said pathway leading to the common well. As against the said findings the learned counsel appearing for the appellant has not made any objections. Under such circumstances, the findings of the trial Court as well as the first appellate Court in respect of the injunction restraining the defendants from taking water from the common well situated in S.No.208/6 to S.No.208/3 and 208/9 is liable to be set aside in view of my discussion in the earlier paragraphs with a workable arrangement for drawing water from the common well by the plaintiff as well as the defendants. Point is answered accordingly.

13. In the result, the appeal is partly allowed and the decree and judgment of the first appellate Court in A.S.No.294/94 on the file of the District Court, Salem, in respect of the order or injunction alone is set aside. Defendants are entitled to take water from the common well situated in S.No.208/6 to 208/9 and 208/3 besides S.No.208/4 and 208/7. For the enjoyment of the common well the following workable arrangement is ordered:

The plaintiff as one unit and the defendants as another unit shall use the common well in turns starting from 6.00 am to 6.00 am on the following day, alternatively, without any interference. In the circumstances of the case, parties shall bear their own costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To
1. The Principal District Judge,
Salem.

2. The District Munsif ,
Attur.

3. The Section Officer, VR Section,
High Court, Madras.

+ 1 CC To Mr. T.Murugamanickam, Advocate SR NO 183

Second Appeal No.84 of 1997

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